No. 3112

In The United States Circuit Court of Appeals

FOR THE NINTH JUDICIAL CIRCUIT

THE CITY OF SEATTLE, a Municipal Corporation,

Plaintiff in Error,

vs.

LLOYD'S PLATE GLASS INSURANCE COMPANY, a Corporation,

Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HON. E. E. CUSHMAN, *Presiding.*

Reply Brief of Plaintiff in Error.

HUGH M. CALDWELL,
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REPLY BRIEF OF PLAINTIFF IN ERROR.

Counsel for defendant in error complain of the statement of the plaintiff in error in its brief, but from a reading of the statement of the case made for defendant in error, the only difference we can see is one of expression. The facts are the same, viz.: that this dynamite that exploded was in foreign commerce, in transit from San Francisco to Vladivostok, via Seattle. The vessel on which it was loaded was under the exclusive management

and control of the Lillico Launch & Towboat Company, agents of the owner of the powder, and was anchored at a buoy set apart for that purpose under the terms of Ordinance No. 34379. That one vessel, without any fault on the part of the City of Seattle, failed to take it. That before the next vessel for Vladisvostok sailed the powder exploded without any fault on the part of the City of Seattle. That the city had nothing to do with the vessel, or its cargo, except its port warden, the executive officer of the harbor department, acting under a discretion vested in him by the city council of the City of Seattle, permitted it to lie at Buoy No. 1.

As to the right of the defendant in error to file a claim against the City of Seattle counsel cite the cases of *Firemen's Fund Ins. Co. v. O.-W. R. R. & Nav. Co.*, 58 Wash. 332, and *Palmer v. O.-W. R. R. & Nav. Co.*, 208 Fed. 666. These cases in *extremis* give no aid or comfort to the defendant in error because the facts are entirely dissimilar. Each of these cases was between individuals. A municipality and its rights were not considered. No claim was necessary to be filed in either one of those cases. In the instant case counsel concedes that a claim is a prerequisite to a right of action. A person reimbursed for injuries by an insurance company still has a right of action against the person causing those injuries under the laws of the State of Washington.

Heath v. Seattle Taxicab Co., 73 Wash. 177, is a case where the plaintiff received compensation from the city in the nature of municipal insurance, and was also permitted to recover from the person causing the injury. At page 186 the court said:

> "It is in its essence, municipal insurance for which a consideration is paid. We can see no difference in principle between this and ordinary accident insurance, so far as the question here involved is concerned. The fact that a person injured by another's negligence, having accident insurance for which he has paid, is reimbursed by the insurance company for his loss of time and expenses caused by the injury, cannot preclude him from maintaining an action for these same items against the person causing the injury. It would be contrary to public policy, and shocking to the sense of justice, to hold that the proceeds of insurance paid for by the injured person for his own benefit or that of his widow and children should insure to the benefit of, and grant immunity to, the person whose negligence, wilful or otherwise, injured him or caused his death. 2 Shearman & Redfield, Negligence (5th ed.), § 765; *Harding v. Town of Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Coulter v. Pine Township*, 164 Pa. St. 543, 30 Atl. 490; *Sherlock v. Alling*, 44 Ind. 184; *Althorf v. Wolfe*, 22 N. Y. 355."

In *Engstrom v. City of Seattle*, 92 Wash. 568, this principle was applied as against the municipality:

> "We think the *Heath* case is in point, and that the trial court should have followed the rule there announced. * * * The fact that he collected damages from the persons injuring him while he was in the employment of the city and in the line of his duty, did not relieve the city from complying with its contract of employment with Mr. Engstrom."

We then have this situation. The person suffering the damage to his property is not only entitled to recover from the insurance company on his contract of insurance but would be entitled to recover against the party whose negligence caused the injury. If there was any right in the insurance company to recoup the money it paid on its contract of insurance, it was perhaps subrogated to that right. But it was not subrogated to the right to claim damages suffered by the insured and it could not have that right unless the same was assigned to it. In other words, the persons whose glass was broken had a right to commence an action against the City of Seattle for damages. They had a right to recover from the insurance company on their contract of insurance. The first was in tort; the second on contract and nowhere has the insurance company acquired the right to file a claim or commence an action for the tort. This still remains in the individual whose glass

was broken. Therefore, he must prepare, swear to and file a claim. The person whose property was damaged not having filed a claim, and not having assigned his right to file a claim (if it could be assigned), or his right to sue in tort, there is, therefore, no proper claim filed and the action cannot be maintained. In a suit brought by the person who claimed to have suffered damage to his property evidence as to his being insured could not be introduced.

In *Shay v. Horr*, 78 Wash. 667, at page 669, the court says:

> "It is evident that, notwithstanding the rulings of the court, counsel for respondent and his witnesses intended the jury should fully realize that appellant was protected by some form of insurance. That their efforts to do so constitute prejudice and reversible error, cannot be denied under the previous rulings of this court. *Iverson v. McDonnel*, 36 Wash. 73, 78 Pac. 202; *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Westby v. Washington Brick, Lime & Mfg. Co.*, 40 Wash. 289, 82 Pac. 271; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821. We have held in these cases that it is improper to either directly or indirectly get before the jury any fact which conveys information that the defendant is insured against loss in case of a recovery."

This clearly shows that the tort and insurance contract do not merge but remain separate and a claim must be filed for the tort. Before the defendant in error could sue for the tort it must possess itself of that right. This it has not done. The right to sue for the tort cannot be in two persons at the same time.

We have no quarrel with the principle that where a person violates an ordinance, the result of which is injury to a third person, that the person violating the ordinance is liable in damages. Many cases cited by defendant in error illustrate this principle. But we seriously dispute the proposition that a municipality is liable for the acts of an executive officer of a department, charged with the regulation and control of ships and their cargoes and in whom a discretion has been vested by the law-making department of the municipality, in the exercise of that control and regulation. This distinction is clearly made in *Boulton v. Crowther*, 2 Barn. & Cress. 703, where Littledale, Judge, states the rule:

> "* * * Where an act of parliament vests a power in trustees or commissioners, to be exercised by them not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of the power, the legislature must be taken to have intended that an individual should not receive any compensation for the loss resulting to him from

an act so done for the public benefit."

In *Tinsman v. The Belvidere Delaware R. R. Co.*, 26 N. J. L. Rep. 148, at page 163, the court, speaking through the Chief Justice, says:

> "Speaking of the principle, already averted to, that a public agent, in the execution of a public trust for the public benefit, while acting judiciously within the scope of his authority is not liable for damages, Chief Justice Gibbs said the case is perfectly unlike that of an individual who, for his own benefit, makes an improvement on his own land. The resemblance fails in the most important point of comparison: the work is not done for a public purpose, but for private emolument. *Sutton v. Clark*, 6 Taunt. 29."

The court then adopts the rule as announced in *Boulton v. Crowther.*

In *Radcliffe v. The Mayor of Brooklyn*, 4 Comst. R. 200, Mr. Justice Bronson stated the principle:

> "An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow."

The *Tinsman* case was cited with approval in *McAndrews v. Collerd*, 42 N. J. L. Rep. 189, a case cited by defendant in error.

The case of *Kolb v. Mayor of Knoxville*, 111 Tenn. 311, 76 S. W. 823, cited by defendant in error, affirms the principle that the city is not

liable for the character of the vessel on which the powder was loaded, it not being in the employ of the city nor under its control. The court said:

> "The seventh assignment is based upon the following portion of the judge's charge: 'If you shall be of the opinion that such odors, smells, and other things detrimental to the health of the plaintiff were caused by the unsanitary condition of wagons used by other parties who were not in the employ of the city, and with whom the city had no connection, why, then, there could be no recovery in this case on that account, and it would be your duty to so find.' The basis of fact on which this portion of the judge's charge rests was that the city had authorized one Showalters and another, who were private persons, and in the employ of various people about the city, to dump refuse into the manhole above referred to. In other words, these people were not in the employ of the city at all, but were simply given permission to dump the refuse into the manhole. As a condition of granting the license or continuing it, the city required that wagons of a certain description, that is, with closed tops or barrels with screw tops, should be used. Under these circumstances the city would not be liable for the condition in which the wagons were kept by Showalters and his companion."

Fitzgerald v. Town of Sharon, 143 Iowa 730,

121 N. W. 523, cited by defendant in error, is a trespass case and so all of the cases cited by defendant in error are distinguishable from the facts in the instant case.

From the opinion of the court, Record p. 84, in speaking of the testimony of W. C. Dawson, the court said the question was asked that Buoy No. 1 was a suitable place for storage. The actual question asked was as follows:

> "Q. What would you say as to the safety of Buoy No. 1 for the transferring of explosives such as are in issue here and as to the anchorage of boats or vessels carrying that explosive at that buoy?
>
> "A. I consider it a very proper and safe place for the exchange of explosives from one vessel to another.
>
> "Q. And to anchor boats?
>
> "A. Yes, sir."

The question of storage never was mentioned. The question of transfer and anchorage were both mentioned and the witness testified that it was a safe place for both purposes. That the court should place upon this testimony a construction not warranted does not change the fact that the witness testified that it was a safe place to anchor boats carrying explosives. While the court said he considered this dynamite was in storage no such condition existed as would cause the law to determine that it was in storage. And where a finding of the court was in conflict with the law it cannot stand.

This dynamite was in transit; it had only traveled a portion of its journey. Webster defines "in transit" as follows:

> "A passage through. 'In France you are now. . . in the transit from one form of government to another.' *Burke.* Act or process of causing to pass; as the transit of goods through a country or from a vendor to a purchaser. Goods shipped from one person to another are said to be *in transit* from the time when delivered to the carrier by the consignor to that when actually or constructively delivered to the consignee."

Webster defines storage:

> "Act of storing. State of being stored; the safe keeping of goods in a warehouse or other depository."

Thus it can be clearly seen that this powder cannot be in storage and in transit at one and the same time. That it was awaiting a vessel to complete its journey *does not make it in storage.* From counsel's argument it would have been just as unlawful to have stored this powder at the Harrison Street dock as it would have been to store it anywhere else, because nowhere in Section 39, the section which he contends required this dynamite to be stored at the Harrison Street dock, is the word "storage" used, nor is storage permitted there. The language of that section is:

> "The Harrison Street municipal pier is hereby designated for use temporarily as a

powder dock and for the use exclusively for the *handling* of powder, dynamite and other like explosives and as a place for vessels carrying as cargo, or part cargo, such explosives."

If the dynamite on this vessel which was anchored at Buoy No. 1 was in storage, then if the vessel were lying at the powder dock it would likewise be in storage, and storage is not permitted at the Harrison Street pier.

The logical conclusion from the construction of the ordinance as contended for by defendant in error, would be to deny the right of vessels carrying dynamite or powder in inter-state or foreign commerce to be or lie in Seattle harbor; no place where powder could be kept pending the continuance of its transportation foreign. Such a construction is absurd and we cannot believe that counsel really thinks such a construction should be given to this ordinance. This belief is augmented by his position in the lower court where in argument he said:

> "I quite agree that if Lillico, without having been directed so to do, had taken that dynamite down to buoy No. 1 and it had exploded, that we could not maintain a suit against the City of Seattle because it had failed to enforce the ordinances which would have required the storage of that powder at the Harrison Street dock. I agree to that proposition. We have never asserted anything to the contrary, but we say that that is not this case." (Record, p. 82.)

What counsel here agrees to is what actually happened. Lillico & Company took this powder and dynamite and tied it up at this buoy without the knowledge of the port warden (Record, p. 44) and the port warden simply permitted the dynamite to remain at that buoy until a vessel arrived to carry it to its destination.

We respectfully submit that the judgment should be reversed and the action dismissed.

Respectfully submitted,

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